IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.12873 of 2005
Date of decision: 13.9.2006

M/s Darshan Singh & Company, Bhambri Market, Mandi Gobindgarh

....Petitioner

versus

Municipal Council Mandi Gobindgarh and others

.....Respondents.

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL
HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. HS Sethi, Advocate, for the petitioner.
Mr. SC Pathela, Advocate for respondent No.1.
Ms.Urvashi Dhugga, AAG,Punjab for respondent Nos. 2 and 3.

JUDGMENT:

This petition has been filed for quashing order dated 18.7.2005, Annexure P.6, whereby respondent No.2 declined to accept the objection of the petitioner that respondent No.2 should not decide the dispute.

Case of the petitioner is that on 13.8.1998, an agreement was entered into between the petitioner and Municipal Council, Mandi Gobindgarh for collection of octroi. Dispute arose about the claim of collection of octroi duty on certain items by the petitioner, which was not allowed by the Municipal Council. An order dated 25.9.1998 was passed against the petitioner.

Civil Writ petition No.10570 of 1999 was filed by the petitioner against order dated 25.9.1998 whereby it was directed that Ship breaking material be charged under the Octroi Schedule of Item No. 85 at the rate of Rs.2/- per quintal. The writ petition was dismissed as withdrawn to enable the petitioner to avail alternative remedy on 3.10.2000. Thereafter, the petitioner filed a claim petition before Regional Deputy Director, Local Government, Patiala, respondent No.2 claiming that octroi at the rate of Rs.4/- per quintal ought to be allowed. The said respondent declined to entertain the claim petition but vide order dated 22.11.2004, respondent

No.3, Director Local Government, Punjab, remanded the matter for fresh decision. The said order is as under:-

> " "Sh. H.S. Sethi, Advocate on behalf of the petitioner has argued that the Regional Deputy Director has not indicated the reference filed before him under clause 15(B) of the agreement dated 13.8.1998, entered into between Petitioner/Octroi Collection Contractor and Municipal Council, Mandi Gobindgarh and has simply disposed off the same with the order that the legal notice given by the petitioner in respect of his claim has not been decided by the Municipal Council, therefore, there exist no dispute. As such, the present appeal may be accepted and the Deputy Director-Patiala directed to adjudicate the reference on merit.
>
> Sh.S.C.Pathela, Advocate of the Respondent Municipal Council has contended that the reference made by the appellant before the Deputy Director was not arbitration under the Arbitration and Reconciliation Act, therefore, ever if the Regional Deputy Director has decided the claim of the petitioner / appellants, the dispute can be adjudicated on merit by the appellate authority as the present appeals in continuation of the Original reference.
>
> I have considered the arguments of both the parties.
>
> Admittedly, the Regional Deputy Director, before whom a reference was filed under clause 15(B) of the Contract Agreement executed between the Contractor and the Municipal Council has not decided the claim on merit. The Regional Deputy Director who was the agreed initial authority to adjudicate the dispute arising out of the agreement dated 13.8.1998 was required to decide the dispute unimpressed by any other ground and circumstances except if there was any restrain order in this regard by the Hon'ble Court. Consequently, the justice demands the remand of the reference filed by the

> Appellant / Petitioner to the Regional Deputy Director, Patiala for disposal of the same on merit after affording opportunity to both the parties. The parties are directed to appear before the Regional Deputy Director, Local Government, Patiala on 1.12.2004 at 11: 00 AM. Parties have no objection with regard to the date, time fixed for hearing at Patiala."

The petitioner filed CWP No.4974 of 2005 on the ground that respondent No.2 being lower in rank to the officer who passed order dated 25.9.1998, Annexure P.3 could not decide the same. The said petition was allowed to be withdrawn with liberty to raise objections before the arbitrator under Section 12 of the Arbitration & Conciliation Act, 1996 (for short, 'the Arbitration Act'). The petitioner thereafter filed such objections which have been rejected vide order dated 18.7.2005, Annexure P.6. The order is to the following effect:-

> "Keeping in view your request on the above noted subject the case was sent to the Director Local Government, Punjab Chandigarh that you do not want the decision from the court. In this regard the Govt. has written to this office that your request for changing of the Arbitrator has been rejected. Therefore now the hearing of this case is fixed for 4.8.2005 at 10 AM. You are requested to be present on the said date."

In the reply filed, stand of the petitioner has been opposed by respondent No.2.

Learned counsel for the petitioner submits that respondent No.2 was to act as an arbitrator in terms of clause 15 of the agreement to the following effect:-

> "In case of any dispute regarding the interpretation of this agreement or regarding any terms and conditions out of this agreement the matter shall be referred to DDLG Patiala and his decision shall be final and binding on

> both the parties. Appeals against the decision of the Deputy Director in case of any dispute shall lie first before the Director Local Body Punjab, Chandigarh and finally before the Govt. in the Local Govt. Department."

Learned counsel for the petitioner submits that once the said officer has filed a reply on merits, he could not be expected to act as impartial arbitrator.

Learned counsel for the respondents, however, submit that respondent No.2 is not to act as arbitrator but merely as a departmental authority against whose order, appeal is provided to the Director, Local Bodies as well as to the Government, in the above clause itself.

We have considered the rival submissions.

Reference to the above clause shows that the matter is not being considered by respondent No.2 as an arbitrator. Reference may be made to judgment of the Hon'ble Supreme Court in **Bharat Bhushan Bansal v. UP Small Industries Corporation Limited, Kanpur,** AIR 1999 SC 899, wherein it was observed:-

> "3. The first question that requires consideration is whether there is any clause in the contract which provides for arbitration between the parties. The relevant clauses are Clauses 23 and 24. Under Clause 23, the decision of the Executive Engineer is final, conclusive and binding on both the parties to the contract on all questions relating to the meaning, specifications, designs etc. and as to the quality of workmanship or material used or relating to any other question whatsoever in any way arising out of or relating to the designs, drawings, specifications etc. or otherwise concerning the execution or failure to execute the same. Under Clause 24, except as provided in Clause 23, the decision of the managing Director of the respondent shall be final, conclusive and binding on both the parties to the contract upon all questions relating to any claim, right, matter or thing in any way arising out of or relating to the contract and in respect of all other

matters arising out of the contract and not specifically mentioned in the said clause. Therefore, in respect of certain claims the decision of the Executive Engineer is final and binding on both the parties to the contract. While in respect of the remaining matters, the decision of the managing Director of the respondent is final, conclusive and binding on both the parties to the contract. Clause 24 does not mention that any dispute can be referred to the arbitration of the Managing Director. Clause 24 also does not spell out any duty on the part of the Managing Director to record evidence or to hear both parties before deciding the questions before him. From the wording of Clause 24 it is difficult to spell out any intention of the parties to leave any disputes to the adjudication of the Managing Director of the respondent as an arbitrator.

4. In the case of KK Modi v. KN Modi (1998) 3 SCC 573 : (1998 AIR SCW 1166), a Bench of this Court (of which one of us was a member) had the occasion to consider the essential ingredients of an arbitration clause. Among the ingredients which are described in the said judgment, two important ingredients are,: that the agreement between the parties must contemplate that substantive rights of the parties will be determined by the agreed Tribunal and that the Tribunal will determine the rights of the aprties in an impartial and judicial manner with the Tribunal owing an equal obligation of fairness towards both sides and also that the agreement of the parties to refer their disputes to the decision of the Tribunal must be intended to be enforceable in law. There is a difference between an expert determination and arbitration. S.K.Chawla in the Law of Arbitration and Conciliation at Page 164 states as follows:

"4. Arbitration agreement to be distinguished from

agreement for decision by an engineer or expert, contracts may contain a clause that on certain questions the decision of an engineer, architect or another exper t shall be final. The decision given in such cases by the engineer etc., is not an award. As pointed out by Bernstein, such a person is under no obligation, unless the contract otherwise provides, to receive evidence or submissions and is entitled to arrive at his decision solely upon the results of his own expertise and investigations. The procedure involved is not arbitration and the Arbitration Act does not apply to it. The primary material on which such person acts is his own knowledge and experience., supplemented if he thinks fit by (i) his own investigations; and/or (ii) material (which need not conform to rules of 'evidence') put up before him by either party. An arbitrator on the other hand, acts primarily on material put before him by the parties. The determination by an engineer or an expert would involve a less thorough investigation. Only one mind will be brought to bear on the problem. There will be no discovery of documents, there will not normally be any oral 'evidence' or oral submissions."

5. In the present case, regarding Clauses 23 and 24 together, it is quite clear that in respect of questions arising from or relating to any claim or right, matter or thing in any way connected with the contract, while the decision of the Executive Engineer is made final and binding in respect of certain types of claims or questions, the decision of the Managing Director is made final and binding in respect of the remaining claims. Both the Executive Engineer as well as the Managing Director are expected to determine the question or claim on the basis of their own investigations and material. Neither of the clauses contemplates a full-fledged arbitration covered by

the Arbitration Act.

6. A clause very similar to the present clause was also held to be not an arbitration clause by this Court in the case of State of Orissa v. Damodar Das, (1996) 2 SCC 216 : (1996 AIR SCW 351). The language of that clause was very similar to the present clause. Under the clauses in question "except where otherwise specified in this contract, the decision of the Public Health Engineer, fo the time being", was to be final, conclusive and binding on all parties to the contract upon all questions relating to the meaning of specifications, drawings and instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work, or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract.....or otherwise concerning the works or the execution or failure to execute the same...." This Court held that this clause did not spell out any intention to refer any disputes and differences between the parties to arbitration.

7. The wording of the clause in the present case is very similar to the wording which was interpreted as not an arbitration clause in the above case. Both the above judgments of this Court have relied upon an earlier decision of this Court in the case of State of UP v. Tipper Chand, (1980) 2 SCC 341 : (AIR 1980 SC 1522). The clause which was interpreted in the above case was also materially similar to the clause before us. Clause 22 of the contract in that case provided: "except where otherwise specified in the contract that decision of the Superintending Engineer for the time being shall e final, conclusive and binding of all parties to the contract upon all questions relating to the meaning of the specifications, designs, drawings and instructions hereinbefore

mentioned. The decision of such engineer as to the quality of workmanship or materials used on the work or as to any other question, claim, right , matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications...or otherwise concerning the wrks, or the execution or failure to execute the same.....shall also be final, conclusive and binding on the contractor." This court held that the clause did not contain an arbitration agreement either expressly or by implication. The intention as to vest the Superintending Engineer with supervision and administrative control over the work.

8. In Hudson's Building and Engineering Contracts, Eleventh Edition, Volume I, in paragraph 6.065, while making a distinction between a Certifier and an Arbitrator in a building contract, it has been emphasised that essentially the Certifier in a construction contract will often be performing an administrative rather than a judicial function, and when doing so there may often be no formulated dispute before him at all. He has been described as a "preventer of disputes" in contradistinction to an arbitrator whose function can only arise once a dispute is in existence. He is not under the same obligation to afford the parties or their representatives a full hearing and receive evidence from them. Thus, each contractual provision may need to be carefully scrutinised to see into which category the person named falls.

9. In the present case the Managing Director is more in the category of an expert who will decide claims, rights, or matters in any way pertaining to the contract. The intention appears to be more to avoid disputes than to decide formulated disputes in a quasi-judicial manner. In paragraph 18.067 of Volume 2 of Hudson on Buil;ding

and Engineering Contracts, Illustration (8) deals with the case where, by the terms of a contract it was provided that the engineer "shall be the exclusive judge upon all matters relating to the construction, incidents and the consequences of these presents, and of the tender, specifications, schedule and drawings of the contract, and in regard to the execution of the works or otherwise arising out of or in connection with the contract, and also as regards all matters of account, including the final balance payable to the contractor and the certificate of the engineer for the time being, given under his hand, shall be binding and conclusive on both parties." It was held that this clause was not an arbitration clause and that the duties of the engineer were administrative and not judicial.

10. Since Clause 24 does not contemplate any arbitration, the application of the appellant under Section 8 of the Arbitration act, 1940 was misconceived. The appeal is, therefore, dismissed though for reasons somewhat different from the reasons given by the High Court. There will, however, be no order as to costs."

Respondent No.2 is yet to take a final decision. Notwithstanding the fact that reply has been filed by respondent No.2, we direct respondent No.2 to take a final decision in accordance with law within four months from the date of receipt of a copy of this order. If the petitioner is aggrieved, it can take its remedies in accordance with the contract or otherwise.

The writ petition is disposed of.

(Adarsh Kumar Goel)
Judge

September 13, 2006 (Rajesh Bindal)
'gs' Judge